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In The Supreme Court of the United States

ALPHONSO L. GRANT, in his individual capacity and in his official capacity as a member of the City of Lynchburg Electoral Board and JOHN E. MASON, JR., in his individual capacity, et al.,

Petitioners,

v.

INEZ SALES and DEBRA M. MILLER,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was it error for the Fourth Circuit to conclude that two public officials forever waived their claim of qualified immunity where the Fourth Circuit significantly changed the legally relevant factors to determining qualified immunity after the first but before a second trial?

PARTIES TO THE PROCEEDING

PETITIONERS

ALPHONSO L. GRANT, in his individual capacity and in his official capacity as a member of the City of Lynchburg Electoral Board and JOHN E. MASON, JR., in his individual capacity

and

DAVID T. PETTY, JR., in his official capacity as a member of the City of Lynchburg Electoral Board; CITY OF LYNCHBURG ELECTORAL BOARD; CAROL READ; ARELIA LANGHORNE, in her official capacity as a member of the City of Lynchburg Electoral Board ; JOHN COBB, in his official capacity as a member of the City of Lynchburg Electoral Board; ANNE MARIE MIDDLESWORTH, in her official capacity as general registrar of the City of Lynchburg

RESPONDENTS

Inez Sales and Debra M. Miller.

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ARGUMENT 2

THE FOURTH CIRCUIT'S APPLICATION OF WAIVER WILL DENY THE PETITIONERS IMPORTANT FIRST AMENDMENT RIGHTS.

ARGUMENT 3

THE FOURTH CIRCUIT'S APPLICATION OF WAIVER CONFLICTS WITH THE FOURTH CIRCUIT'S OWN PRECEDENT, IS IN CONFLICT AS WELL WITH DECISIONS FROM OTHER CIRCUITS AND FAILS TO FIT THE REASONS FOR WHICH THE WAIVER DOCTRINE IS OSTENSIBLY CREATED.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit subject of this Petition is reported at 224 F.3d 293 (4th Cir. 2000). A copy of the Opinion is included in the Appendix as Appendix A at 1a. The first opinion of the United States Court of Appeals for the Fourth Circuit in this case is reported at 158 F.3d 768 (4th Cir. 1998), a copy of which opinion is included as Appendix C at 20a. The rulings of the District Court for the Western District of Virginia are not published but are set forth in this Petition as Appendix D at 49a and as Appendix E at 54a.

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its Opinion on August 16, 2000. On August 30, 2000 Petitioners filed a Petition for Rehearing and Petition for Rehearing *En Banc* which the United States Court of Appeals denied on November 29, 2000 (Appendix B at 18a). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1) and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * * * *

U.S. Const., amend. XIV, section 1.

...No State shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall anys state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

*****

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

A.
The Case in the District Court before Sales I

Respondents Miller and Sales were two assistant registrars for Lynchburg, Virginia. The newly appointed general registrar Carol Read did not reappoint them. The non-reappointed assistant registrars made no claim that the newly appointed general registrar violated their civil rights. Rather, the two assistant registrars claimed that two members of the Electoral Board, Grant and Mason, the Petitioners, neither of whom had any power to appoint assistant registrars, caused the newly appointed general registrar to not reappoint the assistant registrars because the incumbent assistant registrars were Democrats. These events occurred in 1995.

The District Court had jurisdiction over this action under 28 U.S.C. §1331 and §1343. The complaint alleged that the plaintiffs, the Respondents herein, were denied rights under the First and Fourteenth Amendments to the United States Constitution and the suit was brought under 42 U.S.C. §1983.

The District Court decided that the only type of evidence that could support the assistant registrars' allegations in the suit was direct coercive influence over the newly appointed general registrar, evidence that the Petitioners' forced the new general registrar (against her will) to not reappoint the assistant registrars.

At trial the District Court decided that the plaintiff assistant registrars were unable to muster the evidence necessary to take this claim of coercion to a jury and granted a judgment to the Petitioners under FRCP 50(a). The district judge determined there was "no legally sufficient evidentiary

basis for a reasonable jury to find for" the plaintiffs on the claims they were making against the defendant electoral board members, the Petitioners here.

The District Court Judge made it clear throughout the trial that the plaintiffs had no case if their claim was that the electoral board members (without appointing authority) and not the general registrar (with appointing authority) were the persons who had acted with allegedly improper political motivations.

B.
SALES I,
THE FIRST APPEAL

The Fourth Circuit in *Sales v. Grant*, 158 F.3d 768 (4th Cir. 1998) (Sales I) changed the "political hirings and firings" law as it had been forged in *Elrod-Rutan*.[1] A totally new and vast set of potential defendants was added to the stage. The political hirings and firings law since *Elrod* had been aimed at the persons with the authority to make the hirings and firings decisions. Sales I changed the law to include persons who have no authority to hire or fire. Under Sales I anyone who with political motivations sets into motion a series of acts by others which they knew or should have known would cause the person with the power to appoint (the general registrar in this case) to fail to reappoint another person for a public job is liable to the non-reappointed person even when there is no allegation against the person with the power to appoint that that person acted improperly. *Sales*, 158 F.3d at 776.

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1 See *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980) and *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

This addition to the *Elrod-Rutan* framework of analysis makes everyone who endorses, actively supports or simply recommends a person for a public job---especially those in the same department or agency---open to suit by those who did not get or who lose the job, and there is no need to sue the person who had the authority to hire or fire. Such an expansion of *Elrod-Rutan* is unwarranted, not supported by precedent and is frankly a dangerous intrusion upon free speech.

After setting out this dramatically new component of political hirings and firings law, the panel in Sales I concluded that the District Court was incorrect to conclude that the jury had no legally sufficient evidentiary basis upon which to make a finding. *Sales*, 153 F.3d at 777. The Fourth Circuit panel reversed the District Court and remanded for a new trial.

C.
CLAIM OF QUALIFIED IMMUNITY RAISED PRIOR TO NEW TRIAL

Approaching a new trial the Petitioners were faced with defending a case where the law of the case was plainly and unequivocally not clearly established constitutional law. The "set into motion a series of acts" expansion of the *Elrod-Rutan* political hirings and firings law was way outside the developed legal landscape present in 1994 and 1995. *Wilson v. Lane*, 141 F.3d 111, 117-18 (4th Cir. 1998). Mason and Grant knew they were entitled to immunity from trial unless pre-existing law dictated, that is, truly compelled (not just suggested or allowed or raised a question about) that their actions in 1994 and 1995 violated clearly established constitutional law. *Jean v. Collins*, 155 F.3d 701, 708-09 (4th Cir. 1998).

The law of the case had changed from immediate, direct, hands-on conduct by the appointing authority to a remote and indirect setting into motion of a series of acts by others which those not having the responsibility for hiring and firing should have reason to believe will cause a decision-maker in the future to make an improperly politically motivated appointment decision. The political hirings and firings law of the case established in Sales I casts the net of *Elrod-Rutan* liability much wider and the Petitioners suggest impermissibly wider than the *Elrod-Rutan* precedent permits.

It is in this context that Petitioners 30 days prior to the case going to trial for a second time articulated and briefed their defense of qualified immunity, raised in their Answers to the suit, in a Motion for Summary Judgment and a Memorandum in Support of Motion for Summary Judgment. The Petitioners asked the District Court to honor their entitlement to avoid, to be immune from, the second trial because the law of the case to be prosecuted against them in the second trial was not clearly established at the time they were alleged to have acted unconstitutionally.

The Respondents filed a Motion and Memorandum to Quash or Strike Defendants' Motion for Summary Judgment.

The District Court though registering a concern about waiver, nevertheless directly and squarely addressed and overruled on the merits the qualified immunity defense raised by the petitioners. The District Court stated on page 3 of its Memorandum Opinion of May 17, 1999

> "The defendants argue, at least with regard to the Motion for Summary Judgment based on a theory of qualified immunity, that they could not

> have raised this issue before because the very opinion issued by the Fourth Circuit in this case changed the scope of what behavior constitutes causation for a claim of politically motivated discharge, and therefore changes what the perimeters of what the defendants should have known to be unconstitutional for purposes of a qualified immunity defense. I disagree. ..." (App. D at 52a).

The Petitioners promptly filed an Interlocutory Appeal under "the Collateral-Order" Doctrine on August 30, 2000. *DeMeglio v. Haines*, 45 F.3d 790, 807-08 (4th Cir. 1995). The Respondents asked the District Court to rule the appeal frivolous which it did, ruling nevertheless that the qualified immunity defense raised by the Petitioners was not without merit. Stated the Court, "while I disagree with the defendants' position regarding qualified immunity..., I do not find the appeal frivolous on the merits." Additionally, the district court stated that "I agree with the plaintiffs that the defendants may raise these motions [qualified immunity and eleventh amendment immunity] with the Court post-trial. And the defendants will be free to appeal decisions rendered at that time, subsequent to the conclusion of the jury trial." (App. E at 54a).

The Fourth Circuit determined the appeal was not frivolous and took jurisdiction under 28 U.S.C. §1291.

D.
SALES II
THE SECOND APPEAL

A divided panel in the case now before you, *Sales v. Grant*, 224 F.3d 293 (4th Cir. 2000), hereinafter Sales II, decided on August 16, 2000 that the defense of qualified

immunity was forever waived because it had not been pursued "prior to remand after Sales I." *Sales*, 224 F.3d at 296-97. Petitioners filed a Petition for Rehearing and Petition for Rehearing *En Banc* on August 30, 2000 which was denied by the Fourth Circuit on the 29th day of November, 2000. Three members of the Fourth Circuit voted in favor of the Rehearing *En Banc* and 7 voted against. (App. B at 18a). This Petition for Writ of Certiorari follows.

ARGUMENT FOR GRANTING WRIT

ARGUMENT 1

THERE IS NO RULE OR PRECEDENT TO SUPPORT THE FOURTH CIRCUIT'S APPLICATION OF WAIVER TO DENY THE PETITIONERS ENTITLEMENT TO QUALIFIED IMMUNITY WHERE THE FOURTH CIRCUIT ITSELF CHANGED THE FACTORS RELEVANT TO THE DETERMINATION OF QUALIFIED IMMUNITY.

Petitioners Mason and Grant raised their entitlement to qualified immunity prior to the trial where the Fourth Circuit Sales I law of the case would certainly be applied. That law of the case is set forth at page 776 of Sales I (App. C at 33a).

> Critically for this case, the §1983 causation language, '[subject] or [cause] to be subjected,' imposes liability not only for conduct that directly violates a right but for conduct that is the effective cause of another's direct infliction of the constitutional injury.

As the First Circuit has put it:

> "The requisite causal connection can be established not only by some kind of direct personal participation in the deprivation, but also by setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury."
>
> *Guiterrez-Rodriguez v. Cartagena*, 882 F.2d 553, 560-561 (1st Cir. 1989)...

This law of the case was not and these "governing substantive principals," to quote Sales I at page 776 were not prior to Sales I, the established law in the *Elrod-Rutan* line of First Amendment cases. This "effective causation by indirect means" addition to the *Elrod-Rutan* canon of First Amendment cases is first articulated in the Fourth Circuit by the Fourth Circuit in Sales I.

The "legally relevant factors" to a determination of the issue of Petitioners' qualified immunity, *Behrens v. Pelletier*, 516 U.S. 299, 309 (1996) were radically altered by Sales I. No case before Sales 1 extended the *Elrod-Rutan* political hirings and firings precedent to persons who did not do the appointing. No case before Sales 1 set out what members of the electoral board (or similarly appointed political bodies) could or could not do in the way of speech and association---partisan or otherwise---to make known to a newly appointed general registrar the desires of the electoral board members as to how the general registrar's office should be run and with whom. No case before Sales 1 had explained "what type or amount of evidence would be constitutionally sufficient to establish" the

constitutional deprivation claimed by the plaintiffs in a case where defendants were not the direct hiring/firing/appointing authority. (*Cf. Gooden v. Howard County, Md.*, 954 F.2d 960, 968 (4th Cir. 1992)).

The Fourth Circuit erroneously failed to acknowledge or even address whether Sales I had changed the legal landscape of the *Elrod-Rutan* First Amendment line of cases. Had the Fourth Circuit addressed this threshold inquiry, it would have been compelled to hold that the *Elrod-Rutan* legal landscape had changed, that new "legally relevant factors" to a qualified immunity claim had arisen and that pursuing the qualified immunity claim prior to the second trial was both necessary and timely.

The Fourth Circuit erroneously neglected to make the threshold inquiry it was called upon by *Behrens*, 516 U.S. at 309 and *Mitchell v. Forsyth*, 472 U.S. 511, 524-26 (1985) to make.[2]

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2 *Behrens v. Pelletier* suggests that at each stage of litigation "the legally relevant factors bearing upon the *Harlow* [*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)] question will be different..." *Behrens*, 516 U.S. at 309 and *Mitchell v. Forsyth*, councils both that qualified immunity just like absolute immunity "is an *immunity from suit* rather than a mere defense to liability..." *Id.* at 526. and that public officials have "an entitlement not to stand trial" where the conduct of which the plaintiffs complain does not violate clearly established law. *Mitchell*, 472 U.S. at 526.

Suarez Corp. Industries v. McGraw, 125 F.3d 222 (4th Cir. 1997), the case the panel majority cites in Sales II, suggests the same conclusion. For even though the Fourth Circuit in *Suarez* decided qualified immunity had been waived at the Motion to Dismiss stage (not having been asserted or raised in the lower court below), it stated the waiver only applied to the current stage of the case. *Suarez*, 125 F.3d at 227. See also the case in this regard cited by Judge Widener in his dissent to Sales II, namely *Kennedy v. City of Cleveland*, 797 F.2d 297, 303-04 (6th Cir. 1986) where qualified immunity was allowed to be raised at trial even though it had been earlier waived because it had not been included in prior pre-trial dispositive motions.

Simply stated, the Fourth Circuit so dramatically changed the rules of the game that it must not be permitted to deny the Petitioners their entitlement to not be tried under the new rules.

ARGUMENT 2

THE FOURTH CIRCUIT'S APPLICATION OF WAIVER WILL DENY THE PETITIONERS IMPORTANT FIRST AMENDMENT RIGHTS.

In the legal precedent established by the cases from *Elrod-Rutan* this Court acknowledges the right to speak out politically but condemns turning political speech into the act of denying someone a job or a promotion because that person does not share the same political beliefs. The focus is always on the act of discharge, termination, promotion, demotion and the defendant is always the person or entity who or which actually makes the employment decision. The inquiry is not whether the employment decision maker is committing a tort against the

employee/appointee but whether the employment decision maker (the appointer) is violating the First Amendment rights of the employees/appointees. And the purpose of the exercise is to preserve the rights of the employees/appointees to speak out politically themselves. It is not the intent of the *Elrod-Rutan* precedent (especially as it was articulated in *Elrod*) to significantly or substantially diminish the rights of the employer/appointer to speak out and even speak out strongly about public matters, even in a partisan way.

We must keep in mind that *Elrod* was a balancing of First Amendment free speech rights which tilted the balance toward the free speech rights of an appointee when the appointer was converting his or her free speech rights into an act of job denial. *Elrod v. Burns*, 427 U.S. 347, 371-372 (1976). The Court itself in *Elrod* struck the balance that one person could not convert his political beliefs into the act of denying a person a job because of the other person's political beliefs. But there was no attempt in *Elrod* to restrain core public or partisan speech outside the immediate arena of the appointer and the appointee. In Sales 1 the Fourth Circuit not only shifts the focus away from the immediate arena of the appointer and the appointee but leaves to the public official the burden of deciding which word or act may set into motion a series of acts by others which he knows or should know would cause an appointing authority to act in a constitutionally impermissible way.

By splicing onto the traditional *Elrod-Rutan* precedent both the general principle of indirect cause and the further principle that that cause can be defined and demonstrated through a series of acts by others which the actor should know would cause the others to inflict the constitutional injury the Fourth Circuit has shifted the focus of the inquiry from the acts and motivations of the employer/appointer (usually one in

number) to the motivations and speech of those (who could be many) who attempt to influence the employer/appointer. Petitioners Grant and Mason submit that this shift in focus permits and encourages a dangerous intrusion into the First Amendment speech and association rights held by Petitioners Grant and Mason (and those similarly situated), an intrusion which is the antithesis of the balancing of First Amendment rights which the precedent of *Elrod-Rutan* attempts to maintain. The fear of being caught up in the web of events that the not-rehired employee could later charge to be unconstitutional political influence or persuasion, will, the Petitioners submit, chill the Petitioners' (and those similarly situated) clear First Amendment rights to politically speak out on matters of public concern.

Rather than acknowledging this major change in the balancing of *Elrod-Rutan* First Amendment rights brought about by its decision in Sales I and therefore acknowledging the Petitioners' right to claim qualified immunity as to this dramatic change in the constitutional landscape, the Fourth Circuit erroneously chose instead to sidestep the issue of qualified immunity through the administrative expedient of waiver.

ARGUMENT 3

THE FOURTH CIRCUIT'S APPLICATION OF WAIVER CONFLICTS WITH THE FOURTH CIRCUIT'S OWN PRECEDENT, IS IN CONFLICT AS WELL WITH DECISIONS FROM OTHER CIRCUITS AND FAILS TO FIT THE REASONS FOR WHICH THE WAIVER DOCTRINE IS OBSTENSIBLY CREATED.

Sales II holds that the Petitioners forever waived their claim of qualified immunity and may not raise it before, at or

after the second trial because they did not articulate that claim beyond raising it in their Answer at the first trial or in the first appeal (Sales I).

Judge Widener is correct in his dissent in Sales II:

> "I submit that a defendant who moves for, and is granted, summary judgment based on one ground, in no way waives his other affirmative defenses that have been pleaded, and these defenses are available in the event the case is remanded for a new trial, as here. Sales II (App. A at 14a).

The doctrine of waiver applied by the Fourth Circuit in Sales II is without legal support. The majority opinion in Sales II admits that the Fourth Circuit had not previously addressed the question of waiver of qualified immunity "under the exact factual circumstances present here." *Sales*, 224 F.3d at 296. Moreover, the use of waiver to deny a claim of qualified immunity under these circumstances appears to be a matter of first impression for the United States Supreme Court.

The majority of the panel in Sales II relies on *Suarez Corp. Industries v. McGraw*, 125 F.3d 222 (4th Cir. 1997) . The reliance is misplaced. Qualified immunity was never alleged nor addressed at any point in any manner by the trial court in *Suarez* and was raised and asserted for the first time in the case only on the first appeal. And even then, the Fourth Circuit concluded that the waiver only applied to "this stage" of the litigation. *Suarez*, 125 F.3d at 226.

Furthermore, the four cases cited by *Suarez* in support of the *Suarez* decision do not at all support the far reaching and draconian version of waiver applied by the majority in Sales II.

G. Heileman Brewing v. Stroh Brewery, 843 F.2d 169 (4th Cir. 1988) involved a new defense "first raised on appeal..." There had been no mention of the defense in the lower court at all. *Suarez* also cites *Buffington v. Baltimore Co., MD.*, 913 F.2d 113, 120-22 (4th Cir. 1990), cert. denied, 499 U.S. 906 (1991) wherein at the time of the first appeal qualified immunity had not even been raised in the answer and by the time of the second appeal, qualified immunity, the Fourth Circuit determined, had not been effectively raised in the appeal. *Suarez* cites the Eleventh Circuit opinion of *Caban-Wheeler v. Elsea*, 71 F.3d 837, 842 (11th Cir. 1996) where the Eleventh Circuit determined that the defendants had waived qualified immunity where the defense was raised for the first time in the second appeal after not having been raised at the first bench trial nor after the first appeal, nor at the second jury trial or a third bench trial. *Berryman v. Regiler*, 47 F.3d 1167, 1995 WL 31575 (6th Cir. 1995)(unpublished disposition) is the fourth case cited by *Suarez* and is a case in which the Sixth Circuit decided that the defendants could not raise the defense of qualified immunity during the first appeal as it had not been raised in the 12(b)(6) motion or the Rule 56 summary judgment motion prior to the appeal but "if properly raised on remand, the district court will have ample opportunity to address defendants' qualified immunity defense." *Berryman*, 1995 WL 31575 at *5.

As pointed out by Judge Widener in his panel dissent, the majority Sales II panel opinion also conflicts with decisions of the Second and the D.C. Circuit.

In the Second Circuit an affirmative defense is sufficiently raised and is not waived so long as the defense is set out in the defendants' answer as was done by both Petitioners in this case. In *Santos v. District Council of New York City-etc.*, 619 F.2d 963 (2nd Cir. 1980) the affirmative defense of statute

of limitations[3] was not raised until after the case had gone through one appeal and was on remand; then its assertion was only by placing it in the answer. *Santos*, 619 F.2d at 966.

And of like import is the case of *Kulzer v. Pittsburgh-Corning Corp.*, 942 F.2d 122, 125 (2nd Cir. 1991) where the Court states

> "The assertion of a limitations defense in the answer preserved [the defendants'] right to raise the defense both during the first trial and before the second. ..."

The D.C. Circuit Court of Appeals case of *Daingerfield Island Protective Soc. v. Babbitt*, 40 F.3d 442 (DC Cir. 1994) is in substance indistinguishable from the case before the Court. *Daingerfield* was an environmental group suing the Park Service. Of the many claims involved, there was a challenge to an exchange agreement. The Park Service won at the initial district court stage of the litigation when the district court granted summary judgment. The environmental group appealed and the D.C. Circuit reversed the district court and remanded for further consideration of the issues. After appeal and on remand the district court again granted summary judgment but this time granted summary judgment as to the challenge to the exchange agreement based on a statute of limitations set out in the Tucker Act. 28 U.S.C.§2401. Then in a second appeal the environmental group argued that the Park Service had

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3 A defense of qualified immunity is certainly no less eligible than a defense of the statute of limitations for preservation by merely being raised in the Answer. Petitioners submit the defense of qualified immunity is indeed "no mere defense to liability" but is a member of that small class of rights---an entitlement---"too important to be denied review..." *Mitchell*, 472 U.S. at 524-25.

"abandoned its limitations defense by failing to assert it before the first appeal." *Daingerfield* at 445. But the DC Circuit ruled

> "Under the usual rule, an affirmative defense is deemed waived if it 'has not been raised in a pleading, by motion, or at trial.' ... As we have already noted, the government adequately raised the limitations defense in its answer---it was not required to reassert the defense in its subsequent successful summary judgment motion." Id at 445. *(emphasis added)*

Cases from the First and from the Seventh Circuit as well as the other cases about waiver set forth in this Petition demonstrate that the majority panel ruling in Sales II on waiver veers far afield from the central purposes allegedly to be served by the court made doctrine of waiver. The problem for the court in the First Circuit case of *Guzman-Rivera v. Rivera Cruz*, 98 F.3d 664, 670 (1st Cir. 1996) was not that the qualified immunity defense had been raised for the first time on the eve of the *third* trial (and second appeal) but that according to the Court the defendants had pursued a strategy of delay which had prejudiced the plaintiffs and abused the judicial process. And the Seventh Circuit in *Rakovich v. Wade*, 850 F.2d 1180, 1204 & fn. 16 (7th Cir. 1988) suggested that the purpose of the court made waiver doctrine was to ensure that the defense of qualified immunity be brought to the attention of the trial court at some stage of the litigation before the trial court and not raised for the first time in the appellate court on a second appeal. In the case presently before the Court there is no showing that the Petitioners had pursued a strategy of delay which has prejudiced the Respondents, that they have abused the judicial process or that prior to the second trial the defense of qualified immunity was not brought to the attention of and addressed by the trial court.

As discussed above the Petitioners requested their entitlement for immunity from the second trial at a time and in a manner which gave the Respondents and the district court ample time and opportunity to address the qualified immunity defense. There was no Pre-Trial Order, Rule of Court or previous Western District of Virginia or Fourth Circuit case which mandated that the affirmative defense of qualified immunity be articulated and briefed (anymore than by raising it in the answer pursuant to Federal Rule of Civil Procedure 8(c)) sooner---in the circumstances here---than it was. And the Respondents and district court judge had the opportunity to and did squarely address the qualified immunity defense that the Petitioners had raised.

CONCLUSION

In conclusion, it was error to conclude that the Petitioners had forever waived their defense of qualified immunity where (1) that defense had been raised by their Answer, (2) the Respondents' *Elrod-Rutan* non-reappointment claim had been dismissed under Rule 50(a) at the District Court, (3) where the Circuit Court reversed the District Court but in doing so expanded the situations (dramatically changed the legal landscape-the legally relevant factors) where the *Elrod-Rutan* hiring and firings First Amendment law would apply and (4) where the Petitioners raised and briefed qualified immunity prior to a second trial, a second trial where the newly expanded *Elrod-Rutan* hiring and firings First Amendment law would for the first time in the Fourth Circuit be applied.

The Petitioners Grant and Mason respectfully request a Writ of Certiorari be issued to review that portion of Sales II which holds that the Petitioners have forever waived asserting

their claim of qualified immunity, to reverse that holding of the Fourth Circuit and rule that the Petitioners are entitled to qualified immunity, dismissing the case against them or in the alternative, to remand the case to the Fourth Circuit with instructions that it address and rule on the claim of qualified immunity in light of the legally relevant factors significantly altered by Sales I.

The Fourth Circuit established new law that will be applied in the second trial. It is horribly unfair for the Fourth Circuit to violate its own precedent and use waiver to deny the Petitioners qualified immunity to the new legal landscape, it, the Fourth Circuit created. This Court must prevent this result, this abuse of the doctrine of waiver if indeed such a doctrine does, in these circumstances, apply to the entitlement of qualified immunity, which the Petitioners submit, it should not.

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